

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MUGASHA, J.A., NDIKA, J.A., And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 94 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

VERSUS

**JULIETH SIMON PELEKA (The Administratrix RESPONDENT
of the Estate of the late GEBU ICHOMA SAYI)**

**(Appeal from the Ruling of the High Court of Tanzania
at Mtwara)**

(Twaib, J.)

Dated the 14th day of March, 2019

in

Misc. Criminal Application No. 4 of 2019

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JUDGMENT OF THE COURT

8th May & 14th July, 2020

KOROSSO, J.A.:

The appellant, the Director of Public Prosecutions (DPP) is appealing against the Ruling and Order of the High Court sitting at Mtwara in Misc. Criminal Application No. 4 of 2019 dated 14th March, 2019 which was determined in favour of one Julieth Simon Peleka, the legal representative and administrator of the estate of one Gebu Ichoma Sayi who is now deceased.

The background is that, one Gebu Ichoma Sayi, was arraigned in the Resident Magistrate's Court of Mtwara at Mtwara for the offence of

Unlawful Possession of Forest Produce contrary to section 88 of the Forest Act No. 14 of 2002 read together with Regulations 10 and 57 of the Forest Regulations GN No. 153 of 2004. It was alleged that on the 5th day of January, 2013 at Mtambaswala area within Nanyumbu District in Mtwara Region, the said Gebu Ichoma Sayi was found in possession of 3,300 pieces of timber valued at Tshs. 105,000,000/- without a licence issued by the Director of Forests. The accused (as he then was) denied the charges.

In the trial which ensued the prosecution presented five witnesses and five exhibits while the defence fronted two witnesses and sixteen exhibits to support their case. After a full trial, the accused was found not guilty and acquitted by the trial court. The 3300 pieces of timber tendered as exhibit P4 were ordered to be restored to the accused upon completion of the required clearance procedures.

Dissatisfied, the DPP appealed to the High Court Mtwara against the decision and order of the trial court. The appeal filed and registered as Criminal Appeal No. 25 of 2018 was marked abated by an order of the learned High Court Judge (Mlacha, J.) on the 25th July, 2018. Following the death of the respondent, the current respondent one Julieth Simon Peleka, initiated efforts to seek to be handed the pieces of

timber ordered to be restored to the accused by the trial court, having made written requests to the Resident Magistrate In-charge Mtwara Region and the State Attorney In-charge, Office of Attorney General, Mtwara, efforts which were barren of fruits.

While the follow-up was on going, on the 11th of January, 2019 the DPP filed an application under Section 13A (1) and (2)(b) of the Proceeds of Crime Act Cap 256 Revised Edition 2019 (the PCA) and sought for the 3300 pieces of timber which were previously seized from Gebu Ichoma Sayi during investigation be confiscated to the Republic. The application was duly countered by the current respondent. The learned High Court Judge (Twaib, J.) after hearing and considering the relevant submissions from counsel from both sides, dismissed the application finding it devoid of merit. It is against this decision, that the DPP has filed the current appeal before us. The appeal comprises three grounds that contend:

1. That the High Court Judge erred grossly both in law and fact by holding that the purposive approach cannot be invoked to interpret section 13A (1) and (2)(b) of the PCA, that a situation where the accused person dies before the conclusion of trial is not intended also to cover a situation where the respondent in an appeal case dies

before conclusion of appeal, basing on the fact that the beneficiary who is dead cannot appear to defend himself.

2. That the High Court Judge erred grossly both in law and fact by holding that granting confiscation or forfeiture order would have the effect of setting aside acquittal order by the Resident Magistrate's Court.
3. That the High Court Judge erred grossly both in law and fact by holding that, granting application for confiscation or forfeiture order would be tantamount to entertain the abated appeal through the back door.

At the hearing of this appeal, the appellant DPP had the services of Mr. Oswald Tibabyekomya, learned Principal State Attorney assisted by Mr. Awamu Mbagwa, learned Senior State Attorney and Ms. Eustazia Wilson, learned State Attorney whereas Mr. Wilson Ogunde, learned Advocate appeared for the respondent.

The appellant-DPP canvassed the three grounds of appeal conjointly. Mr. Mbagwa faulted the learned High Court Judge for holding that there was no need to construe section 13A (1) and 2(b) of the PCA purposively. It was his contention that had the learned judge invoked the purposive interpretation he would have found that the circumstances

envisaged in section 13A (1) and (2)(b) of the PCA include a situation where a person dies before conclusion of appeal although such setting has not been expressly provided for. That the omission was made inadvertently.

The learned Senior State Attorney argued further that when considering the reasons behind enactment of section 13A(1) and (2)(b) of the PCA and applications for confiscation or forfeiture proceedings, undoubtedly such proceedings are intended to remove and deter incentives for crimes, by eliminating or incapacitating all means facilitating commission of crimes. That this can be inferred from the fact that such applications arise when there is commission of what is termed as "serious crimes" as defined under section 3 of the PCA, such as, money laundering and related predicate offences. That under section 3 of the Anti-Money Laundering Act, Act No. 12 of 2006 (AMLA), environmental offences are also predicate offences and since the offence charged against Geyu Sayi was an offence contravening the provisions of Forest Act, it indisputably falls within the ambit of environmental offences as defined, and is thus a serious offence.

He thus argued further that the learned High Court judge when interpreting section 13A (1) and (2) (b) of the PCA should have taken

into account the fact that the application before him related to a charge arising from a serious offence necessitating the need to invoke purposive interpretation so as to meet the ends of justice and ensure that perpetrators of crimes are deprived of properties acquired from their criminal ventures.

According to the learned Senior State Attorney, this issue has been discussed by various courts in different jurisdictions and thus it is important for our courts to find inspiration from such decisions, citing the holding of this Court in **Attorney General vs Mugesi Anthony and 2 Others**, Criminal Appeal No. 20 of 2011 (unreported) to cement his point. In this case, he argued, the Court found the need to borrow a leaf from the decisions from other jurisdictions which dealt with matters related to confiscation and forfeiture of tainted properties. Mr. Mbagwa thus implored the Court to be persuaded by the holdings in two decisions from South African courts in **National Director of Public Prosecutions (NDPP) and Another vs Yasin Mac Mohamed and 3 Others**, Case CCT12/02 and **NDPP vs R.O. Cook Properties (PTY) Ltd** and **NDPP vs 37 Gillespie Street Durban (PTY) Ltd and Another**, Case No. 260/92 and 111/03. He also entreated the Court to also seek inspiration from an article titled **Confiscation Orders**, 49 N.

Ir. Legal Q. 38 1998, stating that criminals should not enjoy or benefit from crimes.

Mr. Mbagwa contended further that section 13A (1) and (2) of the PCA was introduced to fill in an existing lacunae in the law to cover situations where death occurs on the part of the accused during investigations, trial and also appeals to ensure that no one benefits from criminal acts. He added that section 13A of PCA in effect deals with non-conviction based confiscation, but conceded that they had failed to get any decision from other jurisdictions addressing post-abatement confiscation. The learned Senior State Attorney asserted that, although a criminal appeal and confiscation proceeding are separate proceedings, the mischief to be addressed being how to deal with the fruits of crime. As such, in confiscation proceedings the court's duty is to determine whether confiscation of assets can be heard and thus an abated appeal should not bar confiscation proceedings.

The learned Senior State Attorney then took us on a journey discussing reasons for non-conviction based forfeiture and confiscation processes, stating that these are sometimes known as "civil forfeiture" processes and then referred us to an article titled "**Comparative Analysis of Czech Asset Recovery legislative framework with**

international standards and legislation of select countries,” ECCU-3106-ACAMOL-CZ-TP7/2015. He stated that the article argues that non-conviction based confiscation covers situations where a criminal process is unsuccessful including where the defendant dies. In this regard, he urged us to be persuaded with the recommendations which are in line with the amendments in the PCA that introduced section 13A intended to also cover appeals regardless of the unclear framing of the provision by Parliament which he viewed to have been inadvertently drafted. Thus, he urged the Court to find that in such a situation it is important to purposively construe the said provision, as a cure for the anomaly as it was done in **Joseph S. Warioba vs Stephen Wassira and Another** [1997] T.L.R 272 where the Court construed with a purposive approach and restored the phrase “corrupt practices” back into section 114 of the Elections Act, 1985 after being inadvertently omitted by the legislature. The Court trod the same path in **Augustino Lyatonga Mrema vs Republic** [2003] T.L.R 8.

Mr. Tibabyekomya argued that applying the literal meaning to the case on hand will lead to absurdity since the mischief intended to be cured with the said amendment, will not be adequately addressed. The absurdity here he argued, is that in limiting the scope of the provision

by construing section 13A of PCA plainly and disregarding circumstances where an acquittal can be overturned or situations where a convicted person appeals and dies before the appeal is concluded, which may lead to denying the heirs an opportunity to benefit from any right the person had in the property,. He also argued that confiscation proceedings are not intended to overturn the decision of the trial court and section 13A should be considered jointly with section 9 and 10 of PCA. The learned Principal State Attorney contended that, the learned High Court judge when construing section 13A of PCA was more preoccupied with entertaining the appeal through the back door instead of addressing the application before him.

In response, the respondent through his counsel, Mr. Ogunde opposed the appeal urging us to dismiss it. His submissions on the three grounds of appeal were in similar manner they were presented by the appellant. Regarding the argument that the learned High Court Judge did not go into the merit of the application, the learned counsel countered this arguing that the High Court judge addressed the implications of section 13A of PCA and then determined the application on merit. He stated that in the said application, the Director of Public Prosecutions (DPP) was essentially requesting the High Court to

confiscate 3300 pieces of timber alleging that if the appeal was not abated the DPP would have pursued the appeal successfully. This being the case, he argued that whether or not the DPP would have won the appeal was irrelevant in consideration and determination of the application before him and not otherwise.

The learned counsel added that since section 13A of PCA is very clear and unambiguous, it is indubitably restricted to where an accused person dies while under investigation or when investigations are complete and has been charged but before being convicted. Therefore the courts cannot invoke purposive interpretation to bring the meaning not intended by Parliament.

The learned counsel also argued that once an accused person has been acquitted, this right conferred by the court cannot to be taken away, unless it is reversed by a higher court on appeal or revision. According to the respondent's counsel, the Parliament never intended to stretch the application of section 13A of PCA on appeals. He made reference to two decisions of the High Court to support his stance, that is, **DPP vs Selemani Aziz Ally**, Criminal Appeal No. 42 of 2017 and **DPP vs Salum Mohamed Salum and 6 others, Consolidated**

Criminal Appeals No. 31, 36, 97 and 69 of 2017 and 14, 26 and 27 of 2018 (both unreported).

On criticisms made that the findings of the learned High Court judge concentrated on the effect of the appeal instead of giving a broad construction of section 13A PCA, the learned counsel maintained that this was because, in the wake of an acquittal of the accused person, the order of confiscation could not be done through the application because the relevant appeal had abated. He thus prayed for the appeal to be dismissed.

The rejoinder by the learned Principal State Attorney was brief. He reiterated their submissions in chief and also distinguished the holding in **Republic vs Mwesiga Godfrey and Another**, Criminal Appeal No. 355 of 2014 (unreported), stating that the case does not support the arguments by the respondent's counsel invoking purposive interpretation when the language of the statute is plain and unambiguous.

On our part, having carefully gone through the record of appeal, the submissions by both counsel and cited authorities, we propose to deal with the first ground of appeal and then address the 2nd and 3rd grounds conjointly. Our starting point is the first ground of appeal that reproaches the learned High Court judge for failing to invoke purposive

interpretation when construing section 13A (1) and Section (2)(b) of the PCA to the application for confiscation. The record of appeal shows that when considering the application and the prayers by the applicant for the court to invoke purposive interpretation of section 13A (1) and (2) (b), the learned High Court judge took into account the fact that the power to order confiscation is discretionary and has to be exercised judiciously, and that the court must be satisfied that on the balance of probabilities the applicant disclosed reasonable grounds for the grant of the said order.

Having considered the import of the circumstances which allow the Attorney General to apply for an order of confiscation as outlined in the stated provision in determining the propriety or otherwise of invoking purposive interpretation, the learned High Court judge stated:

"...Applying the purposive approach in interpreting section 13A(1) and (2)(b) of the Proceeds of Crime Act, as Mr. Kimweri has invited the court to do, would have the effect of taking away Mr. Sayi's right to the timber, which right has already been recognized and granted to him through the lower court's order. I do not think that the circumstances would justify such a stance. I am thus not inclined to accede to Mr.

Kimweri's invitation to invoke the purposive approach."

And further on stated that:

*"Besides, I am of the considered view that the purposive interpretation cannot be used to interpret the section in the manner proposed by the learned Senior State Attorney, for two more reasons: One, it will not reflect the clear intention of the Legislature, whose words plainly intended to restrict its application to two stages only, namely, where the matter is still under investigation (which must be shown to be actively being pursued by the investigating authorities) and the suspect dies before being taken to court, but all indications showing the likelihood of a confiscation order; and two, where the charge has been laid against the suspect, but he dies **before the conclusion of the trial**, and reasonable grounds exist for the belief that a confiscation order would have been issued against that person upon conclusion of trial."*

The learned State Attorneys argued that the above findings of the High are erroneous because section 13A (1) and (2) (b) of PCA was construed literally. They referred us to a chain of authorities many coming from other jurisdictions and having read them we found them both interesting

and informative. As held in the **Attorney General vs Mugesu Anthony and 2 Others**, Criminal Appeal No. 220 of 2011 and **East African Development Bank vs Blueline Enterprises Limited**, Civil Appeal No. 110 of 2009 (both unreported), that although Tanzanian courts are not bound by such decisions, it is not wrong when dealing with matters arising from similar circumstance to seek inspiration from decisions arising from similar legislations around the world irrespective of the differences in legal systems. We shall be guided accordingly.

As conceded by the counsel for the applicant and the respondent, we have decisions related to proceedings for confiscation and forfeiture of tainted property. Thus, reading from the decisions cited, **NDPP and Another vs Yasin Mac Mohamed and 3 others** (supra) and **NDPP vs R.O Cook Properties (PTY) Ltd** (supra) and other authorities such as the articles cited, what we gather and is undisputed is that, confiscation proceedings are relevant for the following reasons; **One**, because they are intended to remove incentives of crime. **Two**, confiscation deters persons from using or allowing their property to be used in crime. **Three**, confiscation eliminates or incapacitates some of the means by which a crime may be committed in other words neutralizing the means. **Finally**, that confiscation advances the ends of justice by depriving those involved in crime of the property concerned.

However, the underlying issue at this juncture is whether or not the learned High Court judge in determination of the application by rejecting the invitation to invoke purposive interpretation in construing section 13A of PCA, in effect also failed to consider the merits of the application. This Court has had occasions to address canon of statute interpretation in various cases including the **Republic vs Mwesige Geoffrey Tito Bishamu**, Criminal Appeal No. 385 of 2014 (unreported), where we borrowed a leaf from decisions from other jurisdictions and adopted the holdings of the Supreme Court of United States in **Consumer Products Safety Commission et al. vs GTE Sylvania, Inc. et al.** 227 U.S. 102 (1980) that:

"...the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive... the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion".

Consequently, the Court in **Republic vs Mwesige Geoffrey Tito Bishamu** (supra) held that:

"Indeed it is axiomatic that when the words of a statute are unambiguous "judicial inquiry is

complete". There is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation. This is all because courts must presume that a legislature says in a statute what it means and means in a statute what is says there"

A similar position was restated by this Court in **Barnabas Msabi Nyamonge vs Assistant Registrar of Titles and Another**, Civil Appeal No. 178 of 2018, in interpreting the provision of 22(4) of the Magistrates Courts Act, Cap 11 Revised Edition 2002 stated that:

"It is an elementary principle of statutory interpretation that the plain meaning rule is to be resorted first. That is what we have done. The court will only be entitled to employ other principles of statutory interpretation if the plain meaning rule would lead to absurdity."

Similar sentiments with regard to statute interpretation and the fact that Tanzanian courts are bound to apply plain language of a statute to give effect to the intention of the legislature in the first instance were also pronounced in **Chiriko Haruna David vs Kangi Alphaxard Lugora and 2 Others**, Civil Appeal No. 36 of 2012 and **National Bank of**

Commerce vs Commissioner General Tanzania Revenue Authority, Civil Appeal No. 52 of 2018 (unreported).

In the present case, the applicant invited us to find that the learned High Court judge erred by construing the said provision plainly and urged us to invoke purposive interpretation to construe section 13 A of the PCA within the wider context on the import of confiscation and forfeiture proceedings beyond trial proceedings. On the other hand, the respondent's counsel was of the view that in the wake of unambiguous and clear wording of section 13A of PCA such stance is uncalled for. At this juncture for ease of reference we reproduce section 13 A (1) (2) of PCA and the read.

"13A (1) - Where a person dies while under investigation or after being charged but before a conviction, the Attorney General may apply to the court for a confiscation order.

(2) The court may grant an application for confiscation order where it is satisfied, on balance of probabilities that-

(a) a person was under investigation when he died and reasonable steps have been taken to conduct investigation of an offence alleged to have been committed;

(b) a person has been charged but dies before the conclusion of the trial.

And there are reasonable grounds to believe that a confiscation order would have been issued against that person if he was alive."

Our reading of section 13A(1) and (2)(b) of PCA leads us to find that under this provision, the Attorney General (DPP) may apply to the court for **a confiscation order where a person dies while under investigation or after being charged but before conviction.** That the court may grant such order if satisfied on balance of probabilities under two circumstances. **First**, that a person who died was under investigation and reasonable steps have been taken to conduct investigation of an offence alleged to have been committed and **second**, a person has been charged but died before conclusion of the trial and there are reasonable grounds to believe that a confiscation order would have been issued against the person if he was alive.

It is unquestionable that the PCA must be read as a whole and that the construction of the provision must bear in mind other related provisions such as sections 9 and 10 of the PCA. Section 9 of the PCA as amended accords the Attorney General leeway to apply for confiscation order where a person has been convicted of a serious offence as defined under section 3 of the PCA, while section 10 provides for the procedure

for the confiscation proceedings, including notification within specified time. Thus, as stated by the learned counsel for the respondent, what is pronounced in the two sections just shows that there are other provisions relevant for applications of confiscation orders. While under section 9 and 10 of PCA an order for confiscation is sought upon conviction, section 13A of PCA circumstances are linked to the death of the person under investigation and before conviction. We find that sections 9 and 10 of PCA even when read together with section 13A of PCA, there is no inference on a situation where there is an appeal be it with or without conviction, except where a person dies before conviction but is subject to investigations or trial to have been completed.

We have thoroughly examined the High Court Ruling and discerned that the learned High Court Judge after considering all the circumstances pertaining to Section 13A of PCA, was convinced that there was nothing to show that what is stated therein does not reflect the intention of the Parliament.

The court's duty when construing statutory provisions is to first resort to the literal rule of interpretation. Looking at section 13A (1) and (2) (b) of PCA, resorting to the plain meaning rule, we are satisfied that what is stated is what the legislature intended it to mean and there is

nothing to show that apart from the circumstances therein, the legislature did not intend the confiscation order to be issued in an appeal. As rightly observed by the learned counsel for the respondent, invoking other meaning to what is plainly stated in the relevant provisions will defeat the object and purpose for which the provision was meant to serve. Indisputable, the intention of the legislature was to ensure that the property proved to be illegally obtained or tainted, be subject to confiscation proceedings even upon the death of the accused but confined it to circumstances during investigation and during trial before conviction and not any other circumstances.

In the present case the accused person was acquitted by the trial court and died prior to the appeal filed by the DPP being heard. We find that, section 13A (1) and (2) (b) of PCA unfortunately, does not provide for such situation. We find that the provision cited does not lead to any irrationality or absurdity. With due respect, we find the situation advanced by the learned State Attorneys to be far-fetched because the issue of proving whether or not the property is tainted to warrant such an order will still be an issue for determination, and cannot be determined in an application under section 13A of the PCA. We thus find that this ground has no merit, and the High Court properly directed itself

by refusing to invoke purposive interpretation under the circumstances and within the confines of the provision of the law which is clear and unambiguous.

The second and third grounds of appeal challenge the High Court's holding that granting of forfeiture order would have the effect of setting aside acquittal order of the trial court and tantamount to entertaining the abated appeal through the back door. As already expounded above the learned State Attorneys contended that such statements meant the learned High Court judge went into the cogency and merit of the abated appeal instead of addressing the application before him. On the other hand, the learned counsel for the respondent was of the view that the learned High Court Judge was only responding to what was before him in court and thus urged the Court to find the arguments by the applicant's counsel without merit.

Our scrutiny of the record of appeal has shown as rightly advanced by the learned counsel for the respondent when deliberating on the challenged issues under discussion, that the learned High Court judge was deliberating on what was before him as submitted by the parties. The chamber summons and the oral submissions by the learned Senior State attorney who represented the DPP illustrate this.

Paragraphs 8, 9 and 12 of the affidavit supporting the chamber summons sworn by Mr. P. Kimweri, Senior State Attorney found at pages 4 and 5 of the record of appeal, aver that the late Gebu Sayi unlawfully imported to the country from Mozambique 3300 pieces of timber without the requisite authorization from the Tanzania Forest Services. That the DPP had reasonable grounds to believe that a confiscation order would have been issued against Gebu Sayi if he was alive. Paragraph 4 of the said affidavit states the fact that Gebu Sayi was found not guilty and acquitted of the charges against him. There are also submissions by Mr. Kimweri, the learned Senior State Attorney, during hearing of Misc. Criminal Application No.4 of 2019 as found at page 139 of the record of appeal, that when the DPP appealed they expected the acquittal to be set aside on appeal though unfortunately it abated on the death of the respondent, and thus the rights of the parties were never determined and that for them there was a "deemed conviction" of Gebu Sayi.

With the said allegations before him, the learned High Court Judge had no other choice but to consider and dispose of the issues raised hence his observations in his Ruling that there was no finding that the 3300 timber were proceeds of crime or tainted property, since Gebu Sayi

had been acquitted and that it was not proper to state that it was tainted property. On whether the DPP would have won the appeal if the respondent was alive, the learned High Court judge observed that this was not a relevant issue in the application but went on to comment that in any case, being guided by past decisions in appeals with similar circumstances, that is **DPP vs Jamila Salum Mtaly and Another**, Criminal Appeal No. 34 of 2017 and **DPP vs Azizi Salum Pume and 6 Others**, Consolidated Criminal Appeals No. 31, 36, 97 and 69 of 2017 and Nos. 14, 26 and 27 of 2018, the appeal would have more likely been unsuccessful.

We find that these remarks were just observations in passing on matters raised by the applicant's counsel and in any case they did not prejudice the rights of the applicant, since the said appeal was already abated. At the same time, when discussing the said issues, the learned High Court judge had already made a finding to construe the provisions of section 13A(1) and (2)(a) of the PCA through its plain language. So in no way can it be argued that, such observations influenced the High Court judge in anyway in rejecting invoking purposive interpretation. We thus find that the second and third ground of appeal to lack merit.

For the foregoing reasons, the appeal is devoid of merit and is hereby dismissed in its entirety.

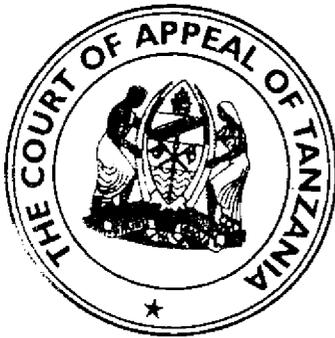
DATED at DAR ES SALAAM this 10th day of July, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The judgment delivered this 14th day of July, 2020 in the presence of Mr. Elia Athanas, learned State Attorney for the appellant/Republic and Mr. Wilson Ogunde, learned counsel for the respondent is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL